PUBLIC INSURANCE CO. LTD. v. LEE CHAU

[O.C.J. (Chang Min Tat J.) February 6, 1969]
[Ipoh — Civil Suit No. 148 of 1965]

Insurance — Third party claim — Reimbursement from insured of monies paid in settlement of — Failure to give notice of accident as soon as possible — Breach of condition — Insurers repudiating liability.

The plaintiffs were the insurers of the defendant's vehicle. They paid a sum of $5,500 in settlement of a claim brought by a third party as a result of an accident involving the defendant's vehicle and the third party. It was a condition in the policy of insurance that notice of an accident would be given as soon as possible and that the insured was to repay all sums which the insurers were not liable to pay but for the Road Traffic Ordinance.

The plaintiffs claimed for the reimbursement of the sum paid in settlement of the third party's claim on the ground that the defendant had committed a breach of the condition requiring her to give notice of the accident as soon as possible. It was found on the facts, that no notice was given until five months after the accident. The defence was that even if there was a breach of the condition, the plaintiffs were not entitled to a reimbursement of the said sum as by settling the third party's claim after knowledge of the alleged breach they had condoned the breach and were estopped from repudiating liability. Also, having repudiated liability their right of subrogation ceased and the plaintiffs were not entitled to reach a settlement with the third party, to which the defendant was not a party.

Held, allowing the claim: (1) the giving of the notice five months after the accident was not sufficient compliance with the condition of the policy. It did not give the plaintiff adequate time to provide for legal representation and to arrange for the medical relief for the third party which would have substantially mitigated the damages;

(2) where a policy of insurance provides for a right of reimbursement, the insurers are entitled to a reimbursement from the insured of monies paid by way of settlement of a third party claim in circumstances in which they have a right to repudiate their liability under the policy.

Case referred to:—

(1) *Gan Chwee Leong* v. *New India Assurance Co. Ltd.* [1968] 1 M.L.J. 196.

CIVIL SUIT.

Peh Swee Chin for the plaintiffs.

C. Navaratnam for the defendant.

Chang Min Tat J. (delivering oral judgment): In this action the plaintiffs as the insurers of the defendant's vehicle claimed reimbursement of a sum of $5,500 paid by them in settlement of a third party's claim against the defendant arising from an accident between the defendant's vehicle and the third party. Their action is grounded upon an alleged breach of the condition of the policy for failing to give notice of the accident to the insurers as soon as possible after the occurrence of the accident as required in the policy.

The defence averred that she did give notice of this accident on or about the 9th day of May, 1963 and again on the 10th of October, 1963, the day after the summons was served on the driver. The defendant therefore denied any breach of condition.

It is in my view convenient to deal with this case first on the finding of fact whether the defendant had in fact given the notice as averred by her before dealing with the law. There will of course be judgment for the defendant if I find as a fact on the evidence before me that notice was given on the 9th day of May, 1963.

The plaintiffs' agents testified in court that they were not given any notice until the 10th of October 1963 and relied on a claim form which was executed by the defendant and which the defendant acknowledged to have been executed on or about the 10th October as proof of the first information. The plaintiffs called in effect the office staff of their agents in Ipoh and each member of the office staff denied that they received this alleged phone call on the 9th May, 1963 or at any time thereafter. The claims manager was called. He was the person who dealt with all claims and he was the person to whom any notification of accident would in the end be referred to. The manager of the agency also called and he denied again that he had received any such call or that his office had received any such call and lastly the clerk of the office was called. She was the one who would ordinarily have taken any message addressed to the manager in the absence of the manager and she denied again that there was any such call. As against this the defence called (1) their former supervisor, (2) the brother-in-law of the defendant, and (3) the defendant herself. The supervisor said that he put through a phone call the day after the accident and the following day he went to the agents office. What the brother-in-law of the defendant for his part said was not really relevant as he could only testify to what happened in October and not in May. The defendant on her part was with respect to her rather vague. She did not claim to have notified the plaintiff company in May and was indecisive of the visit in October. The defendant's supervisor gave evidence that he phoned the agents of the plaintiff company on 8th May, 1963 the day after the accident and that he himself went unaccompanied either by the driver or the defendant on 9th May, 1963. But it is noticed that in the bundle of documents the first allegation of this alleged visit to the agency was "a few days" after the accident. If the defendant was able, before me, to fix definitely the time of the visit to the agency after the accident I see no reason for her failure to instruct her

solicitor sufficiently and precisely when on the 26th of March, 1964 she alleged this due notice. Taking this into consideration and on the whole of the evidence I come to the finding of fact that no notice was in fact given on the day after or a few days after the accident and that the first notice that was given to the plaintiff was in October 1963, some 5 months after the accident. I am strengthened in my view of this finding by the admission of the defendant's witnesses that as far as they knew at the time of the accident there was no damage to the defendant's lorry or to the third party's bicycle and that all that the third party sustained was a very slight injury on the right hand. If that was the view held there was no anticipation on their part of any claim or serious claim by the third party. There never was any possibility of any claim by the defendant against insurers on its comprehensive policy. If there was no such anticipation then there would appear to be no necessity of reporting and no danger of repudiation or claim for reimbursement arising from the accident.

Having dealt with the facts I now come to the effect of such notice and to the defence. The plaintiffs submit that the 5 months is not notice "as soon as possible" as required by condition 4 of the policy and that they were therefore entitled to repudiate and to claim back from the defendant such sums as they had spent in meeting the statutory claims of third parties. The notice that was given on the 10th October, 1963 was only 4 days before the trial of the driver. It is in evidence that the plaintiffs' agents told the driver to seek a postponement if he could on the 14th October and in any event not to plead guilty. As I understand it the driver did ask for a postponement and was refused. He claimed trial and the trial proceeded and he was found guilty. It is alleged by the defendant that the summons was served on the driver on the 10th October or the day previous. If that is so then the 14th October must have been the return date and in any event on that day a request for an adjournment would not have been unreasonable and as I understand the practice in the lower courts, would have been granted. The trial however proceeded on that day and it would appear therefore that the summonses were served on the defendant not in October but some time earlier but of this there is of course no evidence one way or the other. But the net effect of course is that the plaintiffs were given hardly any time in which to provide the defendant's driver with legal representation and to conduct the defence in such a way as to protect their interests as insurers and ultimate paymaster of the third party's claim or to arrange for the necessary medical relief for the third party which would have mitigated substantially the damages. The injury sustained was a fracture of the right humerus with shoulder dislocation. The third party was in court, though he did not give evidence. His arm shows muscular wastage and is permanently disabled to a certain extent. What the effect of immediate medical attention might be is now speculative, but it would have been prudent practice to have offered this attention.

In my view therefore having regard to the circumstances I do not think that the notice that was given on the 10th October, 1963 was sufficient performance of the defendant's duty to advise the plaintiffs of the accident and was a breach of the condition of the policy. It is however suggested in defence that by repudiating liability the plaintiffs were not legally liable to pay any compensation to the third party and that in this vicious circle of having paid this compensation to the third party the plaintiffs had waived their right to repudiation in the sense of condoning the breach of the condition. Again it is said by the defendant that the plaintiffs' right of subrogation under the policy had by the fact of repudiation itself ceased and they were not entitled to make any settlement with the third party to which the defendant was not a party. It is also said that by their knowledge of the alleged breach of the condition and the settlement the plaintiffs were estopped from repudiating liability and finally in all the circumstances the plaintiffs had only themselves to blame for meeting such a claim.

With respect it seems to me that these defences could, in the light of the judgment of Ismail Khan J. (as he then was), in the case of *Gan Chwee Leong* v. *New India Assurance Co. Ltd.*[1] hardly be maintained. With respect the learned judge had so clearly stated the law with respect to the insurers' right to take over proceedings or negotiations from the insured that I propose not to quote the judgment in extenso. It will be sufficient for me to say that as in that case I find that the insurers have acted in the common interest of themselves and the insured. The one point of difference between the present case and the case of *Gan Chwee Leong* is that in the latter case the insurers had failed to prove any liability on the part of the insured to reimburse the insurers for money paid to third parties. It would appear that in that case the insurers set out the terms and conditions of the policy so far as they thought them relevant to their case without setting out any clause. if there was any, providing for such reimbursement. By reason of this failure on their part to prove that they had a right to call on the insured to reimburse them, they lost the case. But in this case the whole policy was put in evidence. The

terms and conditions of the policy are before the court and it is a term of the policy that the insured shall repay to the insurers all sums paid by the insurers which they would not have been liable to pay but for the legislation.

It is absolutely clear on the normal construction of the policy that it is a condition precedent of the policy that the insured should give notice as soon as possible of the accident and it is just as clear that there is a condition in the policy that the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the legislation. Under the normal law of contract there is no liability of a contracting party to meet its obligations under the contract in the presence of a breach of condition by the other party. The Road Traffic Ordinance, 1958. however by section 80 makes it obligatory on the part of the insurer to meet any judgments obtained by the third party and provides that any clause restricting this duty is null and void as against the third party. But there is reserved to the insurers the right to claim for reimbursement.

The payment to the third party in this case was not in satisfaction of a judgment but it was nevertheless a payment made in the interests of the insured and the insurers in reasonable abortion of a claim at law which the plaintiff company, reasonably, in my view, thought was indefensible. The right to claim reimbursement was preserved by contract between the insured and the insurer and in my view the plaintiffs must succeed in this case.

There will be judgment for the plaintiffs for the sum of $5,500 and costs.

Judgment for the plaintiffs.

Solicitors: *Peh Swee Chin; Gibb & Co.*

ANGLO-AMERICAN CORPORATION (M) SDN. BHD. v. DATO' PHUA CHENG LEONG

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) February 10, 1969]

[K.L.—Federal Court Civil Appeal No. X65 of 1968]

Hire-Purchase — Repossession by owner — Notice to terminate — Claim of arrears of hire-rent — Right to recover — Hirer cannot recover any payment made under agreement — Contracts (Malay States) Ordinance, 1950, ss. 75 and 98.

Contract — Guarantor — Liability of — Hire-purchase agreement — Arrears of hire-rent.

This was an appeal from the decision of the High Court on a claim by the appellants for instalments due under a hire-purchase agreement of a tractor. The hirer had paid the initial payment of $6,451 under the agreement and up to May 6, 1964 had paid by way of hire-rent the sum of $13,336 when the total amount due as hire-rent was $33,124, so that by that date he was in arrear with the rent to the extent of $19,788. The appellants sent a letter to the hirer informing him that as he had failed to pay the instalments they had instructed their representative to repossess the tractor. The learned trial judge found that no notice was re-required to terminate the hiring but if notice was required the letter was sufficient notice for that purpose. He also held that the respondent as guarantor was liable to pay the sums due under the agreement. The learned trial judge then found that the amount recoverable was $3,047 made up as follows:— The agreed hire-purchase price was $49,034, the first defendant had paid a total of $19,787 and therefore the balance of the purchase price was $29,247. The appellants resold the seized tractor for $32,200 after spending $6,000 on the repairs, so the amount they recovered was $26,200. The learned trial judge gave judgment for the appellants for the difference, that is $3,047.

Held, allowing the appeal: (1) the learned trial judge had misdirected himself in law and had failed to distinguish between the claim for arrears of monthly hire-rent and the claim by way of compensation for depreciation. The appellants were entitled to recover the balance of instalments due, and the amount already paid by the hirer and the amount realised by the resale of the property were wholly irrelevant to this claim;

(2) no case had been made out by the respondent for equitable relief which could exempt him from liability to pay the hire-rent;

(3) the appellants were therefore entitled to judgment in the sum of $19,788 in respect of arrears of hire-rent and $500 in respect of repossession fees making a total of $20,288 with interest as claimed.

Cases referred to:—

(1) *Anglo-American Corporation Ltd.* v. *Goodwood Sawmill Co.* [1961] 1 M.L.J. 263.

(2) *Helby* v. *Matthews* [1895] A.C. 471.

(3) *Kelly* v. *Lombard Banking Co. Ltd.* [1959] 1 W.L.R. 41.

(4) *Brooks* v. *Beirnstein* [1909] 1 K.B. 98.

(5) *South Bedfordshire Electrical Finance Ltd.* v. *Bryant* [1938] 3 All E.R. 580.

(6) *Stockloser* v. *Johnson* [1954] 1 Q.B. 476.

(7) *Campbell Discount Co. Ltd.* v. *Bridge* [1961] 2 All E.R. 97.

(8) *Maynard* v. *Mosely* (1676), 3 Swan 655.

(9) *Galbraith* v. *Mitchenall Estate Ltd.* [1964] 2 All E.R. 653.

(10) *United Engineers (Malaysia) Ltd.* v. *Lai Ping Yoon* [1968] 1 M.L.J. 189.

(11) *Overstone Ltd.* v. *Shipway* [1962] 1 W.L.R. 117.

(12) *Maung Ba Oh* v. *Motor House Co. Ltd.* A.I.R. 1929 Rangoon 368.

(13) *Abdul Quaddeer* v. *Watson & Sons Ltd.* A.I.R. 1930 Rangoon 193.

(14) *Enayatullah Khan* v. *Jalan Trading Co. & Anor.* A.I.R. 1965 Patna 274.

FEDERAL COURT.

A.D. Rajah for the appellants.

R. Talalla for the respondent.

Cur. Adv. Vult.

Gill F.J.: This is an appeal from a decision of the High Court whereby, on a claim by the